

ISSUES

Claimant contends that her permanent partial impairment is not limited to her left leg but, instead, extends to her cervical and lumbar spine, as well as her left hip. She requests that the Board find she has a 12 percent permanent partial impairment to the whole body pursuant to the opinion of Dr. George Fluter. In the event the Board finds claimant sustained permanent impairment only to her left hip, claimant contends the ALJ erred in calculating her left hip impairment as 7 percent to the left lower leg rather than as 3 percent to the whole body.³

Respondent requests that the Board reverse the Award of the ALJ and find that claimant failed to establish that she sustained an accident that arose out of and in the course of her employment. In the event the Board finds claimant sustained an accident, respondent argues that claimant did not suffer an injury or injuries as a result of the alleged accident.

The issues for the Board's review are:

(1) Should Dr. Stein's opinion testimony based upon the records of Dr. Cusick be considered?

(2) Did claimant sustain an accidental injury or injuries that arose out of and in the course of her employment with respondent?

(3) If so, what is the nature and extent of claimant's disability?

(4) Is a permanent impairment at the level of the hip a scheduled injury or an injury to the body as a whole?

FINDINGS OF FACT

Claimant worked for respondent as an over-the-road driver. On November 8, 2007, she was unloading a trailer in Georgetown, Texas, using a pallet jack when she slipped. She tried to catch herself with her left arm, but fell. Her left hip landed on the floor of the trailer, and her left side and shoulder hit the wall of the trailer. She did not immediately have any symptoms, but within an hour started to feel numbness on the left side of her face, head, neck, upper torso, left arm, and left leg.

³ Although claimant's Application for Review raises an issue concerning whether she is entitled to a work disability, her brief and submission letter do not include arguments for work disability, and the evidence in the record shows that claimant is currently employed at respondent doing the same work she performed before her injury. During oral argument to the Board, counsel for claimant agreed that claimant was seeking a permanent partial disability based upon her percentage of impairment of function and not a work disability.

Claimant reported her accident to respondent that day and, when she returned to Kansas, asked for medical treatment. She was seen by Dr. Robbyn Franklin on November 10, 2007. She said by the time she saw Dr. Franklin, her symptoms had gotten worse, and she not only had numbness but also had pain on the entire left side of her body from her head to her toes. Claimant followed up with Dr. Mark Dobyns, who ordered an MRI. The MRI showed claimant had mild desiccation at L4-L5 with mild disk space narrowing. Dr. Dobyns treated claimant for about two months and then sent her to Dr. Michael Chang, who gave claimant an epidural injection in her spine, a nerve root block in her spine, and a steroid injection in her hip. In February 2008, claimant was seen by Dr. Cusick, who ordered physical therapy.

Claimant was off work from February 22, 2008, until October 2008. The record does not indicate which doctor provided her with an off-work restriction. In October 2008 she returned to work at respondent at her regular job as an over-the-road driver. Her symptoms improved slightly while she was off work but were still present when she went back in October 2008. The symptoms worsened after she returned to work, which she attributes to her work activities and lack of medication. The sitting and bouncing in her job make her back hurt. She has pain in her left leg down to her foot that starts in her hip. Her muscles tighten and burn. She walks with a limp and is unable to run. Climbing into her truck aggravates her problems. She has fallen about 10 times since her accident because her left leg does not always hold her.

Dr. Paul Stein, a board certified neurosurgeon, examined claimant on August 5, 2008, at the request of respondent. Her chief complaints were back and lower extremity symptoms. She complained of a burning pain in her lower thoracic and lumbar region all the way to the tip of her toes, pain in the lateral portion of her left hip and in her left knee and difficulty walking. She said that standing for 10 minutes and climbing stairs were difficult. Claimant further told Dr. Stein she had various sensations affecting the left side of her body, including a half headache and a half neck ache.

At the time Dr. Stein saw claimant, her gait was normal and she did not have a limp. She could walk on her heels and toes and raise her body weight onto the toes of both feet. The strength in her lower extremities was intact. She had full range of motion in her neck and her low back. She had mild tenderness to palpation on the left side of her neck, the left side of her mid-back, and the left side of her low back. There was no muscle spasm or guarding. She had considerable tenderness over the left lateral hip consistent with trochanteric bursitis. The remainder of her neurological examination, including reflexes, motor and sensory, was intact.

Dr. Stein ordered an EMG and nerve conduction test because of claimant's complaints of burning in her left leg. In error, an EMG and nerve conduction test were performed on claimant's left upper extremity. Those results were negative. Later, the EMG and nerve conduction test ordered by Dr. Stein on claimant's left lower extremity were done, and the results of those tests were also negative.

Dr. Stein found some contradictions in claimant's medical records. He said that two days after her accident, claimant could not describe how she fell and landed, but she later gave a detailed description of how she landed. Also, her symptomatology was unusual. Dr. Stein said that having numbness on the entire left side of your body would be rare even if one had a lesion in the brain. Claimant told Dr. Stein she had pain on the left side of her neck and left-sided headaches but had previously told another physician she had no headache or neck pain. However, Dr. Stein testified he did not find any overt signs of symptom magnification.

Dr. Stein said despite the fact that claimant had a lot of complaints and may have some discomfort, she had no findings adequate to determine a permanent impairment of function under the requirements of the *AMA Guides*.⁴ He said that although claimant may have trochanteric bursitis, the *AMA Guides* provide an impairment for trochanteric bursitis only with an abnormal gait. Although claimant's medical records show that at one point she apparently had an abnormal gait, she did not have one when he saw her. Dr. Stein found, therefore, that based on the *AMA Guides*, claimant had no rateable impairment of function.

Dr. Stein said that if claimant would have had an antalgic gait when he examined her, he would have rated her as having a 7 percent permanent partial impairment to the left lower extremity. That would have corresponded to 3 percent permanent partial impairment to the body as a whole. In response to a question by respondent's counsel after being provided with medical records showing that claimant had an antalgic gait in 2009, Dr. Stein stated:

Actually, I would have to change that opinion based purely upon assuming the accuracy and the validity of Doctor Cusick's observations in February of 2009, if she is having intermittent abnormal gait, then I would have to—I would have to say that there's a reasonable likelihood of a 7 percent impairment to the left lower extremity from trochanteric bursitis, accepting the fact that Doctor Cusick is the only one that has seen it, but he has seen it on more than one occasion, and he describes it subsequent to my visit with her.⁵

Dr. George Fluter is board certified in internal medicine and physical medicine and rehabilitation. He is also a board certified independent medical examiner. He examined claimant on December 1, 2008, at the request of claimant's attorney. She told him she had pain affecting the left side of her head and neck, her left upper extremity, the left side of her back, her left buttock, and her left leg. She described the pain as aching, shooting and burning.

⁴ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

⁵ Stein Depo. at 27-28.

On examination, Dr. Flutter found that claimant was not in acute distress and was able to transfer and ambulate without use of an assistive device. Her gait did not appear to be antalgic or spastic. The range of motion in her neck was limited in left lateral rotation, and she had pain at end range. Strength and sensation, reflexes and pulses were normal. She had tenderness associated with taut bands in the muscles of the neck and her upper, middle and low back. She had tenderness in her left buttock and over the greater trochanter at the left hip. Straight leg raising was to 90 degrees when sitting and 75 degrees on the right and 60 degrees on the left when lying down. He said that a discrepancy between straight leg raising in a seated position and a supine position can be a finding of symptom magnification.

On further examination, Dr. Flutter found that simulated trunk rotation caused back pain, but simulated axial loading did not. There was no evidence of widespread pinch tenderness, overreaction, or non-anatomic distribution of pain or sensory loss. There was no tenderness to palpation. Upper extremity testing was normal. She had limitation in lumbar range of motion with forward flexion associated with pain, but she did not have pain with extension. She was able to stand on her toes and heels with minimum difficulty.

Dr. Flutter diagnosed claimant with cervicothoracic strain/sprain associated with myofascial pain. She had a lumbosacral sprain/strain associated with myofascial pain in the low back. There was a possibility she had a left piriformis syndrome, a type of myofascial condition. There were also findings that suggested probable trochanteric bursitis on the left side, and possible lower extremity radiculitis. Dr. Flutter believed her conditions had a causal relationship with her injury in November 2007.

Dr. Flutter said that he would not be able to attribute having symptoms from the top of the head to the tips of the toes on the left side only to a specific neurologic impairment syndrome, short of a traumatic brain injury or MS. He said that based on a soft tissue injury, there is no physiologic explanation for claimant's head-to-toe complaints.

Utilizing the *AMA Guides*, Dr. Flutter rated claimant as being in DRE cervicothoracic Category II for a 5 percent permanent partial impairment and in DRE lumbosacral Category II for 5 percent permanent partial impairment. He also rated her with a 5 percent permanent partial impairment to her left lower extremity for trochanteric bursitis, which is equivalent to a 2 percent impairment to the whole body. These ratings combined for a total permanent partial impairment to the whole body of 12 percent.

Dr. Flutter used *AMA Guides*, table 64, in coming up with his rating for claimant's left lower extremity rating. However, he did not give claimant the full 7 percent rating but gave her 5 percent instead because she had no abnormal gait. He interpreted table 64 to say that he could assess some permanent impairment of function for trochanteric bursitis even if the person does not have an abnormal gait because the *Guides* do not cover every situation and sometimes the judgment of the clinician comes into play.

PRINCIPLES OF LAW

K.S.A. 2008 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2008 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.⁶ Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.⁷

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.

K.S.A. 44-510d(a) states in part:

Where disability, partial in character but permanent in quality, results from the injury, the injured employee shall be entitled to the compensation provided in K.S.A. 44-510h and 44-510i and amendments thereto, but shall not be entitled to any other or further compensation for or during the first week following the injury unless such disability exists for three consecutive weeks, in which event compensation shall be paid for the first week. Thereafter compensation shall be paid for temporary total loss of use and as provided in the following schedule, 66

⁶ K.S.A. 2008 Supp. 44-501(a).

⁷ *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

2/3% of the average gross weekly wages to be computed as provided in K.S.A. 44-511 and amendments thereto, except that in no case shall the weekly compensation be more than the maximum as provided for in K.S.A. 44-510c and amendments thereto. If there is an award of permanent disability as a result of the injury there shall be a presumption that disability existed immediately after the injury and compensation is to be paid for not to exceed the number of weeks allowed in the following schedule:

.....
(15) For the loss of a lower leg, 190 weeks.

(16) For the loss of a leg, 200 weeks.

.....
(18) Amputation or severance below the wrist shall be considered as the loss of a hand. Amputation at the wrist and below the elbow shall be considered as the loss of the forearm. Amputation at or above the elbow shall be considered loss of the arm. Amputation below the ankle shall be considered loss of the foot. Amputation at the ankle and below the knee shall be considered as loss of the lower leg. Amputation at or above the knee shall be considered as loss of the leg.

.....
(23) Loss of a scheduled member shall be based upon permanent impairment of function to the scheduled member as determined using the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

K.S.A. 44-510e(a) states:

If the employer and the employee are unable to agree upon the amount of compensation to be paid in the case of injury not covered by the schedule in K.S.A. 44-510d and amendments thereto, the amount of compensation shall be settled according to the provisions of the workers compensation act as in other cases of disagreement, except that in case of temporary or permanent partial general disability not covered by such schedule, the employee shall receive weekly compensation as determined in this subsection during such period of temporary or permanent partial general disability not exceeding a maximum of 415 weeks. Weekly compensation for temporary partial general disability shall be 66 2/3% of the difference between the average gross weekly wage that the employee was earning prior to such injury as provided in the workers compensation act and the amount the employee is actually earning after such injury in any type of employment, except that in no case shall such weekly compensation exceed the maximum as provided for in K.S.A. 44-510c and amendments thereto. Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average

weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury. If the employer and the employee are unable to agree upon the employee's functional impairment and if at least two medical opinions based on competent medical evidence disagree as to the percentage of functional impairment, such matter may be referred by the administrative law judge to an independent health care provider who shall be selected by the administrative law judge from a list of health care providers maintained by the director. The health care provider selected by the director pursuant to this section shall issue an opinion regarding the employee's functional impairment which shall be considered by the administrative law judge in making the final determination. The amount of weekly compensation for permanent partial general disability shall be determined as follows:

(1) Find the payment rate which shall be the lesser of (A) the amount determined by multiplying the average gross weekly wage of the worker prior to such injury by 66 2/3% or (B) the maximum provided in K.S.A. 44-510c and amendments thereto;

(2) find the number of disability weeks payable by subtracting from 415 weeks the total number of weeks of temporary total disability compensation was paid, excluding the first 15 weeks of temporary total disability compensation that was paid, and multiplying the remainder by the percentage of permanent partial general disability as determined under this subsection (a); and

(3) multiply the number of disability weeks determined in paragraph (2) of this subsection (a) by the payment rate determined in paragraph (1) of this subsection (a).

The resulting award shall be paid for the number of disability weeks at the full payment rate until fully paid or modified. If there is an award of permanent disability as a result of the compensable injury, there shall be a presumption that disability existed immediately after such injury. In any case of permanent partial disability under this section, the employee shall be paid compensation for not to exceed 415 weeks following the date of such injury, subject to review and modification as provided in K.S.A. 44-528 and amendments thereto.

K.A.R. 51-7-8(c) states in part:

(3) An injury involving the hip joint shall be computed on the basis of a disability to the body as a whole.

(4) An injury at the joint on a scheduled member shall be considered a loss to the next higher schedule.

ANALYSIS

Dr. Stein examined claimant at respondent's request. As a part of his examination, he reviewed and considered claimant's medical treatment records, including the records of Dr. Cusick that were provided to him by respondent. At his deposition, claimant provided Dr. Stein a subsequent medical treatment record by Dr. Cusick that was not part of the records provided to Dr. Stein by respondent. Respondent did not challenge the foundation or authenticity of the record, but respondent objected to Dr. Stein considering that additional record because it constituted medical hearsay. Although this objection was made during Dr. Stein's deposition testimony, it was not mentioned as an issue in respondent's submission brief to the ALJ, and the ALJ did not expressly rule on the objection. The ALJ obviously considered Dr. Stein's opinion that relied upon this additional medical record. Thus, by implication, the ALJ overruled respondent's objection.

The Board finds that respondent's objection should be overruled because respondent had already provided Dr. Stein with claimant's medical treatment records and asked him to consider those records in formulating his opinions, including records of Dr. Cusick. Once respondent provided its medical expert with claimant's medical treatment records and asked that expert to take those records into consideration when formulating his opinion, claimant should have the opportunity to give the expert witness a complete history of claimant's medical treatment, particularly where the record is from the records of the treating physicians, some of whose records respondent had already provided. Moreover, Dr. Stein was being asked to consider findings made by a treating physician upon examination, not that physician's opinions. Clearly, Dr. Stein exercised his own judgment in formulating his opinions.⁸ Furthermore, the testimony of Dr. Stein quoted above was in answer to a question asked by respondent's counsel.

Claimant suffered an accident while working for respondent on November 8, 2007. She slipped and fell, injuring her left hip, back and neck. As a direct result of that accident and injuries, claimant now has a chronic condition which has been diagnosed as trochanteric bursitis. This condition causes claimant to have nearly constant pain in her left hip area and an intermittent antalgic gait or limp. Pursuant to the *AMA Guides*, this condition is rateable as a 7 percent permanent impairment of function to the left lower extremity at the level of the hip. This 7 percent lower extremity rating translates to a 3 percent impairment to the body as a whole. The Board does not find, however, that claimant has any other rateable permanent impairments of function to her neck, shoulder, back, leg, or any other part of her body.

⁸ See *Roberts v. J.C. Penney Co.*, 263 Kan. 270, 949 P.2d 613 (1997); *Sims v. Frito-Lay, Inc.*, 23 Kan. App. 2d 591, 933 P.2d 161 (1997); *McKinney v. General Motors Corp.*, 22 Kan. App. 2d 768, 921 P.2d 257 (1996); and *Boeing Military Airplane Co. v. Enloe*, 13 Kan. App. 2d 128, Syl. ¶ 3, 764 P.2d 462, rev. denied 244 Kan. 736 (1988).

CONCLUSION

(1) Dr. Stein's opinions, which took into consideration the medical records and findings of Dr. Cusick, should be considered even absent the testimony of Dr. Cusick.

(2) Claimant sustained personal injury by accident on November 8, 2007, which arose out of and in the course of her employment with respondent.

(3) As a direct result of her accident, claimant suffered a 3 percent permanent partial disability to her body as a whole.

(4) A permanent impairment to the hip is a general body disability, not a scheduled injury.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Thomas Klein dated July 29, 2009, is modified to find that claimant has a 3 percent permanent partial disability to the body as a whole.

Claimant is entitled to 29 weeks of temporary total disability compensation at the rate of \$510 per week or \$14,790, followed by 12.03 weeks of permanent partial disability compensation at the rate of \$510 per week or \$6,135.30, for a 3 percent functional disability, making a total award of \$20,925.30.

As of December 16, 2009 there would be due and owing to the claimant 29 weeks of temporary total disability compensation at the rate of \$510 per week in the sum of \$14,790, plus 12.03 weeks of permanent partial disability compensation at the rate of \$510 per week in the sum of \$6,135.30, for a total due and owing of \$20,925.30, which is ordered paid in one lump sum less amounts previously paid.

Although the ALJ's Award "finds [claimant's] attorney fee retainer is reasonable and approves such fee arrangement,"⁹ the record does not contain a filed fee agreement between claimant and her attorney. K.S.A. 44-536(b) mandates that the written contract between the employee and the attorney be filed with the Director for review and approval. Should claimant's counsel desire a fee be approved in this matter, he must file and submit his written contract with claimant to the Director for approval.

⁹ ALJ Award (July 27, 2009) at 3.

IT IS SO ORDERED.

Dated this _____ day of December, 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Phillip B. Slape, Attorney for Claimant
 Terry J. Torline, Attorney for Respondent and its Insurance Carrier
 Thomas Klein, Administrative Law Judge